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What Is Specific About “Specific Restitution”?

COLLEEN P. MURPHY*

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INTRODUCTION

One of the significant advantages of a cause of action in restitution is that a plaintiff may, under certain circumstances, obtain an identifiable asset held by the defendant. The asset may be property or a fund of money. This remedy—which I will call “asset-based restitution”¹—is

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1. Current drafts of the *Restatement (Third) of Restitution and Unjust Enrichment* sometimes

particularly valuable to plaintiffs in the following circumstances: (1) when the asset is the very thing to which the plaintiff originally was entitled and the plaintiff wants that asset rather than the monetary value of the asset, (2) when the defendant's gain exceeds the plaintiff's loss, and (3) when the defendant is insolvent.² An example of plaintiff preference for an asset rather than the value of the asset is the preference for a family heirloom rather than the value of the heirloom. An example of asset-based restitution that results in a remedy worth more than the plaintiff's loss is a constructive trust over stock that has increased in value since its purchase by the defendant with funds embezzled from the plaintiff.³ In the circumstance of asset-based restitution when a defendant is insolvent, the plaintiff obtains an effective priority over general creditors if the plaintiff can both identify the particular asset as rightfully belonging to the plaintiff and show circumstances, such as fraud, misappropriation, or mistake, that justify the plaintiff's recovery of the asset.⁴

An important functional difference between restitutionary remedies is thus between remedies that give the plaintiff the monetary value of the benefit unjustly obtained by the defendant and remedies that give the plaintiff an identifiable asset that constitutes the defendant's unjust enrichment. The most obvious and accurate way to describe this distinction would be to contrast restitution of value with restitution of an asset. Problematically, however, American restitution scholarship often has labeled the distinction as one between a money judgment and "specific restitution."⁵ This supposed contrast between a money judgment and specific restitution is misleading, for it obscures the reality that a plaintiff's asset-based remedy might be one for money. Moreover, the term specific restitution is confusing because sometimes it is used to mean restitution of the original thing to which the plaintiff was entitled,

describe this remedy as "asset-based restitution." See sources cited *infra* note 110. The drafts also use other phrases, including the problematic term "specific restitution." See sources cited *infra* notes 105–13 and accompanying text.

2. See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT ch. 7, introductory note, at 2–3 (Tentative Draft No. 6, 2008).

3. See *id.* § 58 (entitled "Following Property into Its Product and Against Transferees" and discussing "tracing" rules); RESTATEMENT OF RESTITUTION § 202 cmt. b, illus. 3 (1937) (indicating that when the defendant is a conscious wrongdoer who has exchanged the plaintiff's money for other property, the plaintiff can enforce a constructive trust on the property).

4. See, e.g., *Cunningham v. Brown*, 265 U.S. 1, 11 (1924) (explaining that defrauded claimants—had they been able to trace their funds through the debtor's bank accounts—could have "asserted possession" of the funds "without violating any statutory rule against preference in bankruptcy, because they then would have been endeavoring to get their own money, and not money in the estate of the bankrupt"); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT ch. 7, introductory note, at 3 (Tentative Draft No. 6, 2008) ("[Asset-based remedies,] by recognizing the claimant's interest as owner or lienor of the property in question—often give an effective priority to the restitution claimant over the general creditors of the recipient.").

5. See *infra* Part II.A.

while at other times it is used broadly to mean any asset-based restitution.

In contrast to American scholars, courts in the United States rarely have used the term specific restitution. In those instances when courts have used the term, they generally have meant a remedy giving the plaintiff its original asset.⁶ In common law countries with highly developed doctrine on restitution, such as England, Canada, and Australia, scholars have not used "specific restitution" to distinguish between restitution of value and restitution of an asset, but rather have used terms that more accurately capture the distinction, such as "personal" versus "proprietary," or "*in personam*" versus "*in rem*."⁷

The American Law Institute (ALI) currently is engaged in producing a *Restatement (Third) of Restitution and Unjust Enrichment*. This is an important project, for as Professor Andrew Kull, the reporter of the project, has written, "a substantial portion of the American bench and bar today could not comfortably explain what the 'law of restitution' is or how it works."⁸ One of the many contributions of the *Restatement (Third)* will be its updating of restitution terminology from the original 1936 *Restatement of Restitution*.⁹

Current drafts of the *Restatement (Third)* distinguish "restitution of value" or "a judgment for money calculated to eliminate unjust enrichment" from restitution that is "asset-based," "property-based," or from "identifiable property or an identifiable fund." This terminology for the most part helpfully describes the concepts involved.¹⁰ But the drafts

6. See *infra* Part II.B.

7. See *infra* Part II.C.

8. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT reporter's introductory memorandum, at xvi (Discussion Draft 2000). Professor Douglas Laycock has remarked that "[i]n the mental map of most lawyers, restitution consists largely of blank spaces with undefined borders and only scattered patches of familiar ground." Douglas Laycock, *The Scope and Significance of Restitution*, 67 TEX. L. REV. 1277, 1277 (1989).

9. The Reporter's Introductory Memorandum to the Discussion Draft of the *Restatement (Third)* states that: "[T]he object of Restatement Third, Restitution and Unjust Enrichment is quite literally to restate the American law of restitution, treating the 1936 Restatement not as a work to be revised but merely as an authoritative piece of raw material." RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT reporter's introductory memorandum, at xvi (Discussion Draft 2000). After suggesting that "90 percent of the answers that [the first *Restatement*] gave in 1936 are probably the right ones today," the Discussion Draft asserts that: "The problem is that the existing Restatement communicates little to modern readers. It was addressed to a legal profession that no longer exists, one that instinctively analyzed problems of private law by reference to the forms of action and the doctrines of equity." *Id.* The American Law Institute produced two tentative drafts of a *Restatement (Second) of Restitution*, in 1983 and 1984, but the project was abandoned. See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT, foreword, at ix (Discussion Draft 2000) (mentioning the discontinuation of the *Restatement (Second)* project).

10. I suggest that the terminology of "asset-based" restitution generally is preferable to "property-based" restitution, because the former more obviously includes an identifiable fund of money as well as property. See *infra* notes 108–16 and accompanying text.

also use “specific restitution” to connote asset-based restitution and the recovery of a substitute asset.

What is specific about “specific restitution”? This question leads to a larger one—what is specific about other “specific” terminology in the law such as “specific intent,” “specific bequest,” and “specific performance”? To answer these questions, this Article analyzes the various meanings that are ascribed to the term “specific” in the law. With the current ALI project and its opportunity to clarify the language of restitution, I give particular attention to “specific restitution,” but I do so in the broader context of probing “specific” terminology.

Part I examines, and at times criticizes, how the term “specific” has been used in the law. Within this broader context, I suggest that restitution is “specific” only if the plaintiff recovers its original asset; the term specific restitution should not be used to describe a remedy that allows the plaintiff to trace its original asset into a different form.¹¹ In making this assertion, I rely on an established and precise definition of specific relief as that which gives the plaintiff the thing or condition to which the plaintiff originally was entitled.¹² Part II analyzes how scholars and courts previously have used “specific restitution” and related terms both in the United States and in common law countries. Part III details some of the confusing and misleading uses of “specific restitution” in current drafts of the *Restatement (Third)*. Part III then offers suggestions regarding the terminology of restitutionary remedies, including a recommendation that the *Restatement (Third)* should dispense with the term specific restitution.

I. “SPECIFIC” TERMINOLOGY IN THE LAW

“Specific” terminology in the law can be divided roughly into three categories. In one category are terms employing “specific” as a synonym for “particular.” Another category encompasses uses of “specific” associated with remedies. Sometimes, “specific” in connection with remedies means affording the plaintiff its original entitlement rather than

11. I have previously argued that the term “specific restitution” should not apply to a monetary remedy for a loss or gain originally of money. Colleen P. Murphy, *Misclassifying Monetary Restitution*, 55 SMU L. REV. 1577, 1589–95 (2002).

12. See, e.g., *Dep’t of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 262–63 (1999) (asserting that equitable liens are not specific relief because they do not “give the plaintiff the very thing to which he was entitled” but rather “a security interest in the property, which [the plaintiff] can then use to satisfy a money claim” (quoting *Bowen v. Massachusetts*, 487 U.S. 879, 895 (1988))); *Bowen*, 487 U.S. at 895 (stating that specific remedies “are not substitute remedies at all, but attempt to give the plaintiff the very thing to which he was entitled” (quoting DAN B. DOBBS, *HANDBOOK ON THE LAW OF REMEDIES* § 3.1, at 135 (1973))); DOUGLAS LAYCOCK, *THE DEATH OF THE IRREPARABLE INJURY RULE* 13 (1991) (“[Specific remedies] seek to prevent harm to plaintiff, repair the harm in kind, or restore the specific thing that plaintiff lost.”). See generally Colleen P. Murphy, *Money as a “Specific” Remedy*, 58 ALA. L. REV. 119, 122–34 (2006) (discussing definition by courts and scholars of specific relief as that which gives the plaintiff the original thing or condition to which the plaintiff was entitled).

a substitute; at other times, “specific” relief has been used to connote non-monetary relief or equitable relief. A third category is a catch-all of idiosyncratic usages of “specific.” I will discuss each of these categories in turn and analyze whether and how the term specific restitution fits within these categories.

A. PARTICULAR VERSUS GENERAL

Similarly to common parlance, legal terminology often employs “specific” as a synonym for “particular” and as an antonym for “general.” A few illustrations demonstrate this usage. A specific denial controverts particular allegations of a complaint; a general denial sweepingly denies all allegations of the complaint.¹³ A specific appropriation is an earmark of funds for a particular purpose; a general appropriation authorizes funds for diverse purposes.¹⁴ Specific intent in criminal law is the particular intent to violate the law or the intent to realize a particular objective; general intent is merely the intent to do the act that the law prohibits.¹⁵

The law sometimes uses “specific” in the context of assets, to distinguish particular from general assets, with general assets meaning any or all assets held by the relevant person. For example, a specific lien is an encumbrance on a particular asset of the defendant, while a general lien is an encumbrance that can attach to any of the defendant’s assets.¹⁶

13. See FED. R. CIV. P. 8(b)(3) (“[A] party that intends in good faith to deny all the allegations of a pleading . . . may do so by a general denial. A party that does not intend to deny all the allegations must either specifically deny designated allegations or generally deny all except those specifically admitted.”).

14. See, e.g., BLACK’S LAW DICTIONARY 110 (8th ed. 2004) (“If [a] sum is earmarked for a precise or limited purpose, it is sometimes called a specific appropriation.” (emphasis omitted)); Richard Briffaut, *The Item Veto in State Courts*, 66 TEMP. L. REV. 1171, 1179 n.31 (1993) (“Modern budget practices seek to address state spending comprehensively in one budget or general appropriations bill. By definition such a bill includes more than one subject; indeed, it ought to include all subjects that are matters for state appropriation.”).

15. See, e.g., *United States v. Gibbs*, 182 F.3d 408, 433 (6th Cir. 1999) (stating that with a specific intent crime, “[t]he defendant must act with the purpose of violating the law,” whereas with a general intent crime, the defendant need only “intend to do the act that the law proscribes” (citations omitted)); GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 453 (1978). The Supreme Court has termed the concepts “specific intent” and “general intent” as difficult and potentially misleading. It has discouraged their use in jury instructions, advocating instead jury instructions that relate specifically to the mental state required. See *Liparota v. United States*, 471 U.S. 419, 433 n.16 (1985).

16. See, e.g., BLACK’S LAW DICTIONARY 942–44 (defining both terms). To illustrate, courts and commentators have used the term “general lien” to describe the lien permitted by 26 U.S.C. § 6321 that can attach to “all property and rights to property” held by one who owes federal tax. See, e.g., *United States v. Little*, 52 F.3d 495, 499 (4th Cir. 1995); Steve Johnson, *The Good, the Bad, and the Ugly in Post-Drye Tax Lien Analysis*, 5 FLA. TAX REV. 415, 417 (2002). An example of a specific lien is a mortgage on a particular piece of real property. See, e.g., *United States v. City of New Britain*, 347 U.S. 81, 84 (1954); cf. U.C.C. § 7-209 official cmt. 1 (2004) (in the context of warehouse liens, “a specific lien” for usual charges arising out of a storage transaction “attaches automatically without express notation on the receipt or storage agreement with regard to goods stored under the receipt or

A specific bequest or specific devise in a will is a designation by the testator that the beneficiary is to receive a particular asset, while a general bequest or general devise is a designation that the beneficiary is to receive something fungible, such as money or publicly traded stock, that can be satisfied from any assets of the estate.¹⁷

The specific bequest/devise bears further elaboration. Traditionally, if the testator made a specific bequest of an asset, and the asset was no longer in the testator's estate at death, the gift "adeemed," and the beneficiary received nothing.¹⁸ This traditional rule is still employed by most courts.¹⁹ The Uniform Probate Code, however, provides that the beneficiary of a specific bequest, if the specific asset no longer exists at the testator's death, is entitled to proceeds from the sale of the asset, any condemnation award, proceeds on fire or casualty insurance for injury to the property, any property owned by the testator as a result of or in lieu of foreclosure of the specific asset, or any property acquired by the testator to replace the specific asset.²⁰ If none of the foregoing proceeds

storage agreement," and "by notation on the receipt or storage agreement, the lien can be made a general lien extending to like charges in relation to other goods").

17. See 2 JOSEPH H. MURPHY, *MURPHY'S WILL CLAUSES* § 5.03(2)(a) (2004) ("A specific devise is a gift of some particular property that is identified and distinguished from other property of the testator."); *id.* § 5.03(3)(a) ("A general devise is a devise of property that is payable from the general assets of the estate rather than from any specific asset. . . . Most general devises are of intangible personal property, such as cash or securities.").

18. See UNIF. PROBATE CODE § 2-606 cmt. (1990). The Uniform Probate Code states:

Under the "identity" theory followed by most courts, the common-law doctrine of ademption by extinction is that a specific devise is adeemed—rendered ineffective—if the specifically devised property is not owned by the testator at death. . . . The application of the "identity" theory of ademption has resulted in harsh results in a number of cases, where it was reasonably clear that the testator did not intend to revoke the devise.

Id.; A. JAMES CASNER & JEFFREY N. PENNELL, *ESTATE PLANNING* § 3.2.5.2 (6th ed. 2005) ("Traditional application of the doctrine of ademption by extinction was significantly unforgiving, largely unconcerned with whether absence of the specific item from the estate reflected an affirmative intent on the testator's part to adeem the bequest or flowed unintentionally from a totally involuntary and perhaps unknown loss or destruction of the subject of the bequest."); MURPHY, *supra* note 17, § 5.03(2)(c) (characterizing as the "general rule applicable in most jurisdictions" that a "specific devise adeems by extinction if the property specifically devised is not part of the estate that passes under the will").

19. See MURPHY, *supra* note 17, § 5.03(2)(c) (discussing ademption by extinction as the "general rule applicable in most jurisdictions").

20. UNIF. PROBATE CODE § 2-606 (a)(1)–(5). The Comment to § 2-606 states that subsection (a)(5)—providing that the beneficiary of a specific bequest is entitled to any property acquired by the testator to replace the specific asset—"does not import a tracing principle into the question of ademption, but rather should be seen as a sensible 'mere change of form' principle." *Id.* cmt. To illustrate, the Comment asserts that a specific bequest of "my 1984 Ford" could be fulfilled by giving the beneficiary the replacement automobile—a 1993 Chrysler—that the testator owned at death. This circumstance exemplifies a "mere change of form." *Id.* By contrast, the Comment says, if the testator sold the 1984 Ford and with the proceeds, bought shares in a mutual fund that were owned at death, the beneficiary would not be entitled to the shares. *Id.* It is not enough that the Ford can be "traced" into the shares; rather, subsection (a)(5) requires that the property owned at the testator's death was a "replacement" for the asset that was the subject of the specific bequest. *Id.*

or assets exist, the Uniform Probate Code provides that the beneficiary is entitled to the “value” of the specific bequest, if giving the value is not contrary to the testator’s intent.²¹ In sum, if the particular object of the specific bequest does not exist, the beneficiary will receive either nothing, proceeds from the object of the specific bequest, an asset different than the object of the bequest, or the monetary value of the specific bequest.

What then, is specific about a specific bequest? The “specific” nature of the bequest attaches at the time the bequest is made—the testator has designated a particular asset for the beneficiary. The fact that the beneficiary may not in fact receive the particular asset designated in the bequest does not diminish the propriety of calling the bequest a “specific” one. The question now becomes whether use of the term specific bequest provides an apt analogy for use of the term specific restitution.

Both a specific bequest and specific restitution are asset-based. Sometimes, the fulfillment of the specific bequest may be accomplished by what might be loosely called “tracing” of the specific asset. That is, the asset that was the object of the specific bequest has been exchanged for money or some other asset. In fulfillment of the specific bequest, the beneficiary may be entitled to the new asset. In a parallel fashion, the law of restitution allows the plaintiff, in certain circumstances, to trace an asset originally belonging to the plaintiff into a different asset held by the defendant.²² The plaintiff may trace its asset into money or property acquired by the defendant as a result of the sale, exchange, or investment of the plaintiff’s asset. As will be elaborated in Part II, some scholars have used the term specific restitution to describe this remedy.

Notwithstanding the parallel between the fulfillment of a specific bequest with a “traced” asset and a remedy in restitution that is the result of tracing, I suggest that the terminology of “specific bequests” and “specific restitution” is not parallel. The specific bequest essentially confers a substantive right on the beneficiary at the time of the testator’s designation. The specific bequest remains a specific, rather than a general, bequest, regardless of how the bequest ultimately is fulfilled. By contrast, a restitution plaintiff must first establish its right to a remedy

21. UNIF. PROBATE CODE § 2-606 (a)(6) (amended 1997). The Uniform Probate Code states:

[I]f not covered by paragraphs (1) through (5), a pecuniary devise equal to the value as of its date of disposition of other specifically devised property disposed of during the testator’s lifetime but only to the extent it is established that ademption would be inconsistent with the testator’s manifested plan of distribution or that at the time the will was made, the date of disposition or otherwise, the testator did not intend that the devise adeem.

Id.

22. A plaintiff may also, under certain circumstances, trace its asset into property held by a third person. *See, e.g.*, RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 58 (Tentative Draft No. 6, 2008).

based on the substantive law, and then one or more of several types of remedies might be available. Whether the label "specific" applies to any of those remedies should focus on the nature of the actual remedy. Thus, I will now turn to how the term "specific" has been used with respect to remedies generally.

B. REMEDIAL USES

Courts and scholars have ascribed to the term "specific" many different meanings in the context of remedies. The precise meaning of a "specific" remedy is one that affords the plaintiff its original entitlement rather than a substitute for that entitlement.²³ Inaccurate meanings of "specific" relief equate the remedy to non-monetary relief or equitable relief.²⁴ This section elaborates on the varying meanings ascribed to "specific" relief and relates those meanings to the term specific restitution.

1. The Precise Meaning of "Specific Relief": Affording Plaintiff Its Original Entitlement Rather than a Substitute

In its most precise usage by courts and scholars, a specific remedy is a remedy that gives the thing or condition to which the plaintiff is or was originally entitled.²⁵ A specific remedy is the opposite of a substitutionary remedy, the latter giving the plaintiff a replacement—money or something else—for the plaintiff's original entitlement.²⁶

As a prime example of a specific remedy, consider specific performance. The term commonly denotes a remedy in which the court orders the defendant to provide the very thing to which the plaintiff originally was entitled under a contract.²⁷ For example, a plaintiff's original contractual entitlement might be for goods or for the payment of money under a loan contract. An order of specific performance would command the defendant to deliver the goods or make the loan, thus giving the plaintiff the thing to which the plaintiff originally was entitled. Specific performance, in its common application, thus fits perfectly the precise definition here of specific relief. Sometimes, however, the original performance promised the plaintiff may have become unduly burdensome, impossible, or illegal. The court may order that the defendant nonetheless provide something that is similar to the original

23. See *supra* sources cited note 12 and accompanying text.

24. See *infra* Part II.B.2.

25. See sources cited *supra* note 12 and accompanying text.

26. This definitional distinction between specific and substitutionary relief often is not strictly recognized or implemented, as I have detailed in a prior article. See generally Murphy, *supra* note 12.

27. See RESTATEMENT (SECOND) OF CONTRACTS § 357 cmt. a (1981) ("An order of specific performance is intended to produce as nearly as is practicable the same effect that the performance due under a contract would have produced. It usually, therefore, orders a party to render the performance that he promised.").

entitlement.²⁸ Technically, the plaintiff is getting a substitute, but “specific performance” often describes the remedy.²⁹

What, then, is specific about specific performance when the plaintiff gets something other than its original entitlement? The answer, from a strictly definitional view, is that such a remedy does not afford specific relief. But it is significant that specific performance in these contexts should, in the words of the *Restatement (Second) of Contracts*, “substantially [] assure the expectations of the parties”³⁰ and “effectuate the purpose for which the contract was made and on such terms as justice requires.”³¹ In other words, the court’s decree should, while taking into account undue hardship, impossibility, or illegality, give the plaintiff a performance as similar as possible to the performance promised under

28. See *id.* § 358(1). The *Restatement (Second) of Contracts* observes:

An order of specific performance or an injunction will be so drawn as best to effectuate the purposes for which [the] contract was made and on such terms as justice requires. It need not be absolute in form and the performance that it requires need not be identical with [that] due under the contract.

Id.; 12 ARTHUR L. CORBIN, CORBIN ON CONTRACTS: RESTITUTION, SPECIFIC PERFORMANCE, ELECTION OF REMEDIES § 1137, at 180 (Joseph M. Perillo ed., interim ed. 1993). Corbin notes:

The performance that is required by the decree [of specific performance] need not be exactly the same as that which was promised by the defendant. The exact performance promised may have become impossible or illegal, so as not to be specifically enforceable; and yet the court may be able to bring about substantially the same result without any breach of the law.

Id. (footnote omitted).

29. See RESTATEMENT (SECOND) OF CONTRACTS § 358; see also *Lary v. U.S. Postal Serv.*, 472 F.3d 1363, 1369 (Fed. Cir. 2006) (stating that the appropriate remedy for the case was specific performance and acknowledging that the order would not be for the exact performance contemplated by the contract because exact performance was impossible); *McFarland v. Gregory*, 322 F.2d 737, 739 (2d Cir. 1963) (asserting that “[i]n framing [a decree of specific performance], the performance that it requires need not be identical with that promised in the contract” and extending time for performance beyond the contract specifications). Some cases qualify the term “specific performance” when a plaintiff may be awarded something other than the plaintiff’s original entitlement under the contract. For example, a court might state that an order of specific performance is contingent on a modification of the contract. See, e.g., *Willard v. Tayloe*, 75 U.S. (8 Wall.) 557, 567–68 (1869) (“[T]o enforce a contract specifically, [the court] may refuse its decree unless the party will consent to a conscientious modification of the contract, or, what would generally amount to the same thing, take a decree upon condition of doing or relinquishing certain things to the other party.”). California cases have used the term “quasi-specific performance” when asked to enforce an agreement to make a will. Under state law, a court cannot compel the making of a will to bequeath certain property, but the court can give an equivalent remedy by imposing a constructive trust on the promised property. See, e.g., *Thompson v. Beskeen*, 35 Cal. Rptr. 676 (Cal. Ct. App. 1963) (citing additional cases). The Connecticut Supreme Court seemed to withhold the term “specific performance” from an order for similar performance. *City of Waterbury v. Town of Washington*, 800 A.2d 1102, 1159 (Conn. 2002) (“[W]e would normally examine the entire trial court order to determine whether it provided Washington with the specific performance requested or, if not, whether the order, when viewed in its entirety, provided Washington with effectively the same relief as performance under the contract would have provided.”).

30. RESTATEMENT (SECOND) OF CONTRACTS § 358 cmt. a.

31. *Id.* § 358(1); see also CORBIN, *supra* note 28, § 1137, at 182–83 (“The court should so mold its decree as best to effectuate the purposes for which the contract was made, while at the same time protecting the interests of other persons, avoiding illegality and undue difficulty, and causing no unreasonable hardship on the defendant himself.”).

the contract. In this respect, specific performance may differ from an effort to avoid ademption of a specific bequest, which may result in the beneficiary getting something very different in character than the object of the specific bequest.

Turning now to the context of restitution, a remedy in restitution may take the form of either specific or substitutionary relief.³² Applying the precise definition of specific relief as that which gives the original thing to which the plaintiff was entitled, restitution properly is termed "specific" only when the plaintiff recovers the asset to which the plaintiff originally was entitled.³³ That asset can be either money or property. For example, if an insolvent defendant had stolen money from the plaintiff and deposited the money in a separate bank account holding only the plaintiff's funds, the plaintiff would be entitled to restitution of the money. Restitution here is a specific remedy because the plaintiff gets its original asset—the entire fund of money that was taken.³⁴ Restitution is *not* specific if the plaintiff gets the monetary value of a benefit unjustly obtained by the defendant. For example, assume that the defendant mistakenly took an asset from the plaintiff and then sold it to a bona fide purchaser for value. The plaintiff's remedy in restitution against the defendant is substitutionary, not specific. The plaintiff would be entitled to the monetary value of the asset—a substitute for the original thing to which the plaintiff was entitled.

32. See DOBBS, *supra* note 12, § 4.4, at 256. In his 1973 treatise, Dobbs asserted:

Restitution is often *in specie*. That is, the very thing taken from the plaintiff is restored to him. This is also called specific restitution. In other cases, restitution is substitutionary. That is, the very item taken from the plaintiff is not restored, but some substitute, usually money, is given in its stead.

Id.

33. It is common to refer to restitutionary remedies as measured by the defendant's gain rather than the plaintiff's loss. See, e.g., Andrew Kull, *Rationalizing Restitution*, 83 CAL. L. REV. 1191, 1226 (1995) ("The simplest possible account of the law of restitution . . . will describe it as the branch of civil liability that is based on and measured by the unjust enrichment of the defendant at the expense of the plaintiff."). Throughout this Article, I suggest that "specific restitution" is an appropriate term only for a remedy that gives the plaintiff "the asset to which the plaintiff originally was entitled." An equivalent phrase would be "the asset by which the defendant originally was unjustly enriched." For ease, and to parallel the precise meaning of "specific relief" as a remedy that gives the plaintiff the very thing or condition to which the plaintiff was originally entitled, I have chosen the plaintiff-focused language over the defendant-focused language.

34. See RESTATEMENT OF RESTITUTION § 160 cmt. e (1937); Murphy, *supra* note 11, at 1603–04. In this scenario, because money is fungible, the remedy constitutes specific restitution even though the plaintiff may not get the original bills back. Similarly, a remedy for fungible stock can constitute specific restitution. See *Demoulas v. Demoulas*, No. 90-2344, 1996 Mass. Super. LEXIS 735 (Mass. Super. Ct. Aug. 20, 1996) (referring to "specific restitution" of shares of stock that were fungible with the shares to which the plaintiff originally was entitled). Revising the example given above in the text, assume that the insolvent defendant had spent some of the plaintiff's money, but the rest of the money remained in the bank account. The plaintiff's remedy for that fund of remaining money is not properly termed "specific" restitution because the plaintiff does not get the entire fund of money to which the plaintiff originally was entitled.

Finally, if we apply a definition of specific relief as that which gives the plaintiff the original thing to which it was entitled, then restitution is *not* specific if the plaintiff's remedy is an asset that was the result of tracing the plaintiff's original asset into another form. As I will show in Parts II and III, however, individual scholars and drafts of the abandoned *Restatement (Second) of Restitution* and the ongoing *Restatement (Third)* sometimes employ "specific restitution" to describe plaintiff recovery of an asset different than the one to which the plaintiff originally was entitled.

Arguably, a plaintiff's recovery of an asset other than her original asset might be termed "specific restitution" in the same way that a judicial order might be termed one for "specific performance" even though the plaintiff will get something other than what was detailed in the contract. Recall, however, that specific performance aims "substantially to assure the expectations of the parties" and to "effectuate the purpose for which the contract was made."³⁵ With tracing in restitution, however, the aim is not necessarily to give the plaintiff its original asset, or even a similar asset, but rather to follow the asset into whatever form it may take, including a form that may result in a windfall to the plaintiff. The example of specific performance thus provides little support for calling a restitutionary remedy "specific" when the restitutionary remedy is the result of tracing an asset into a form different than the plaintiff's original asset.

2. *Inaccurate Meanings: "Specific Relief" as a Non-Monetary Remedy or an Equitable Remedy*

Aside from the precise definition of specific relief as a remedy that gives the plaintiff its original entitlement, "specific relief" sometimes has been used inaccurately to connote a non-monetary remedy³⁶ or an equitable remedy.³⁷ The non-monetary remedies of specific performance, injunctions, mandamus, and ejectment, commonly are called specific

35. See sources cited *supra* notes 30–31 and accompanying text.

36. See, e.g., *Cavalier Clothes, Inc. v. United States*, 810 F.2d 1108, 1112 (Fed. Cir. 1987) (contrasting "monetary relief" with "specific relief"); *Rodriguez v. FBI*, 876 F. Supp. 706, 708 (E.D. Pa. 1995) (writing of "monetary and specific relief"). Although specific relief should not be considered the opposite of monetary relief, there are circumstances when specific relief appropriately is considered the opposite of "damages." See *Murphy*, *supra* note 12, at 139–44 (arguing that depending on the meaning of "damages," the term may either include or exclude specific monetary relief).

37. See *Murphy*, *supra* note 12, at 134–37 (asserting that with respect to remedies, the labels "specific" and "equitable" are not synonymous, and citing several cases that mistakenly equated the two terms). I have previously shown that "prospective relief" also has been mistakenly equated to "specific relief." See *id.* at 137–39 (asserting that "prospective" relief is not synonymous with "specific" relief and citing *City of Wheeling v. United States*, 20 Cl. Ct. 659, 664 (Cl. Ct. 1990), *aff'd*, 928 F.2d 410 (Fed. Cir. 1991), which mistakenly reasoned that plaintiff's request for money was not specific relief because the remedy on the facts of the case was retroactive in nature). Because restitutionary remedies generally are retroactive—they force a defendant to give up its unjust enrichment—the distinction between prospective and specific relief is not relevant to this Article.

relief.³⁸ But equating specific relief with non-monetary relief breaks down, because specific performance or injunctive relief can take the form of an order to pay money.³⁹ Conversely, non-monetary remedies that typically are called specific relief, such as specific performance or injunctions, sometimes afford a substitute for the plaintiff's original entitlement.⁴⁰

Even if we were to use the misleading definition of specific relief as a remedy other than money, that would not justify using "specific restitution" to encompass a remedy for something other than the plaintiff's original entitlement. Restitution as the result of tracing an asset into another form can often result in the plaintiff obtaining money. As I will detail in Part II, however, restitution scholarship at times has used "specific restitution" to denote any restitutionary remedy that is not a simple money judgment.

Although several cases have equated "equitable" relief with "specific" relief,⁴¹ the two remedial concepts are not synonymous.⁴² To illustrate, an injunction is the quintessential equitable remedy, but sometimes injunctions afford the plaintiff a substitute for the plaintiff's original entitlement.⁴³ Ejectment and replevin are specific remedies,

38. See, e.g., *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 688 (1949) (contrasting damages with "specific relief: *i. e.*, [sic] the recovery of specific property or monies, ejectment from land, or injunction either directing or restraining the defendant officer's actions"); LAYCOCK, *supra* note 12 (giving examples of specific remedies as injunctions, specific performance, constructive trusts, subrogation, quiet title, cancellation, ejectment, replevin, mandamus, prohibition, and habeas corpus).

39. See *Murphy*, *supra* note 12, at 125–26 (discussing examples of injunction establishing medical monitoring fund and specific performance of a contract for sale of land, ordering buyer to pay contract price); 2 DAN B. DOBBS, *LAW OF REMEDIES* § 8.10, at 535 (1993) ("[I]njunctions have been used to require the defendant to create special funds for payment of periodic medical expenses . . ."); 3 DOBBS, *supra*, § 12.8(2), at 200 (discussing specific performance of contracts to pay money).

40. See, e.g., *Murphy*, *supra* note 12, at 124 (giving examples of an injunction that requires promotion of an employee to a position to which she was not originally entitled and an injunction that compels a prison to provide recreational facilities as a remedy for past unlawful overcrowding); see also *supra* notes 27–31 and accompanying text (discussing circumstances when an order of "specific performance" may order the defendant to do something other than the plaintiff's original entitlement).

41. See *Murphy*, *supra* note 12, at 134–37 (citing several cases that mistakenly equated "specific" relief with "equitable" relief).

42. See, e.g., DOUGLAS LAYCOCK, *MODERN AMERICAN REMEDIES: CASES AND MATERIALS* 7 (3d ed. 2002) ("Most legal remedies are substitutionary, and most equitable remedies are specific, but there are important exceptions in both directions. The law/equity distinction is not a proxy for the substitutionary/specific distinction."); ROBERT N. LEAVELL ET AL., *EQUITABLE REMEDIES, RESTITUTION AND DAMAGES* 280 (7th ed. 2005) ("[O]ne cannot simply say that legal relief is substitutionary, while equitable relief is specific."); *Murphy*, *supra* note 12, at 134–37 (asserting that with respect to remedies, the labels "specific" and "equitable" are not synonymous, and citing several cases that mistakenly equated the two terms).

43. For example, an injunction compelling a prison to provide recreational facilities as a remedy for past unlawful overcrowding would be substitutionary relief. See *Murphy*, *supra* note 12, at 124–26 (discussing how injunctions sometimes afford substitutionary relief rather than specific relief).

giving the plaintiff the real property or chattel, respectively, to which the plaintiff originally was entitled. However, ejectment and replevin are legal, rather than equitable, remedies.⁴⁴

The restitution context further illustrates that a remedy may be equitable but not specific, and vice versa. The constructive trust is an equitable remedy, but it may result in the plaintiff getting an asset other than the one to which the plaintiff originally was entitled.⁴⁵ Restitution of a mistaken overpayment gives the plaintiff the money to which plaintiff originally was entitled, but the plaintiff's remedy is legal, not equitable.⁴⁶ Although some of the equitable restitutionary remedies often do afford specific relief—for example, when a constructive trust imposed on an insolvent defendant or a third person gives the plaintiff the asset to which the plaintiff originally was entitled—it is important not to conflate “equitable” restitution with the concept of specific relief.⁴⁷

C. IDIOSYNCRATIC USES

The law is rife with terms modified by the adjective “specific,” with the meanings of “specific” being idiosyncratic. For example, a specific duty is a “tax calculated on an import's weight, volume, or item count,”⁴⁸ and a specific insurance policy is a basic-form policy.⁴⁹ With such examples, “specific” does not carry obvious meaning.

Scholarly discussion of restitution sometimes has also evidenced idiosyncratic use of the term “specific,” with specific restitution said to confer title to property.⁵⁰ Under this usage of “specific restitution,” the constructive trust (which gives the plaintiff ownership of an asset) is a form of specific restitution, but the equitable lien (which secures plaintiff's money judgment with an identifiable asset) is not.⁵¹

44. See, e.g., 1 DOBBS, *supra* note 39, § 4.2(a), at 383–84; *id.* § 2.9(1), at 162–65; Murphy, *supra* note 12, at 134–36.

45. See sources cited *supra* note 3 and accompanying text.

46. RESTATEMENT OF RESTITUTION § 160 cmt. e (1937).

47. See Murphy, *supra* note 11, at 1601–07 (discussing equitable restitution).

48. BLACK'S LAW DICTIONARY 545 (8th ed. 2004).

49. *Id.* at 822.

50. See, e.g., RESTATEMENT (SECOND) OF RESTITUTION § 30 cmt. a (Tentative Draft No. 2, 1984). Tentative Draft No. 2 of the *Restatement (Second) of Restitution* asserts:

Imposing a constructive trust is also a means of requiring specific restitution to the claimant. In contrast, imposing an equitable lien on an asset does not vest ownership in the claimant and does not afford him specific restitution. The lien assures the claimant that the asset will be devoted to satisfying his right to restitution in preference to the claims of ordinary creditors of the person owing restitution.

Id.; RESTATEMENT OF RESTITUTION § 4 cmt. d (writing of title to property conveyed under constructive trust and “specific restitution of property” separately from the “creation and enforcement of equitable liens”).

51. See, e.g., RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 10, reporter's note c, at 127 (Tentative Draft No. 1, 2001) (contrasting specific restitution with equitable lien); *id.* § 13 cmt. g (same); JOHN P. DAWSON, UNJUST ENRICHMENT: A COMPARATIVE ANALYSIS 34–35 (1951) (noting that

Using “specific restitution” to differentiate the constructive trust from the equitable lien is superfluous and confusing. There is no obvious connection between the term “specific” and title to property. Rather, the core concept at issue is that the constructive trust confers title, but the equitable lien does not. Embedding this core concept of title within the muddled language of specific restitution obscures the substantive point.

D. SUMMARY

Thus far, I have analyzed different meanings ascribed to the term “specific” in various legal contexts and how “specific restitution” might or might not fall within these meanings. I have argued that the term specific restitution should be used only to describe a remedy for the original asset to which the plaintiff was entitled. I now turn to how scholars and courts have used the term specific restitution.

II. “SPECIFIC RESTITUTION” AS USED BY SCHOLARS AND COURTS

Scholarship in the United States has varied in using “specific restitution,” with the spectrum ranging from a narrow use of the term as denoting recovery of the original asset to which the plaintiff was entitled to a broad use of the term as denoting any asset-based restitution. By contrast, reported American cases use “specific restitution” infrequently and mostly in the precise sense of recovery of the plaintiff’s original asset. Treatises and casebooks in England, Canada, and Australia—countries with highly developed law on restitution—also rarely use the term and only to mean recovery of the plaintiff’s original asset. I will examine in this Part how scholars and courts thus far have used “specific restitution” before addressing, in Part III, the terminology of current drafts of the *Restatement (Third)*.

“[t]he Restatement . . . reserves the term constructive trust for decrees awarding specific restitution” and commenting that “[t]o specific restitution of traceable assets we . . . have added the remedial lien, giving another form of restitution”); 2 GEORGE E. PALMER, *THE LAW OF RESTITUTION* § 11.5(b), at 516–17 (1978) (“[T]racing in equity does not necessarily lead to specific restitution of the traceable product; it may lead instead to the imposition of a lien on that product . . .”); 1 PALMER, *supra*, § 4.20, at 544 (“In numerous cases courts have concluded that specific restitution to the grantor would be too drastic and instead have imposed an equitable lien on the land to secure the grantor’s support . . .”); *id.* at 548 (“In the usual case the equitable lien is used when there are equities in favor of the grantee that call for a less burdensome remedy than specific restitution.”). Although the *Restatement (Third)* at times draws a distinction between specific restitution and an equitable lien, as cited earlier in this footnote, at other times it considers the equitable lien to be a form of specific restitution or specific relief. See, e.g., *RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT* § 40 (Tentative Draft No. 4, 2005) (“Specific relief in this case takes the form of an equitable lien . . .”); *id.* § 41 cmt. e, *illus.* 13 (“Owner’s rights by way of specific restitution will be limited to an equitable lien on the stock . . .”).

A. PRIOR SCHOLARSHIP

In probing how the term specific restitution has been used in American scholarship, the starting point is the original 1936 *Restatement of Restitution* ("first *Restatement*"). The first *Restatement* for the most part uses great precision in its relatively few invocations of "specific restitution," typically using the term to denote giving the plaintiff the very asset to which the plaintiff originally was entitled.⁵² However, the first *Restatement* occasionally does use the term in the broad sense of an asset-based remedy in contrast to a simple money judgment.⁵³ Individual scholars and drafts of the abandoned *Restatement (Second) of Restitution* vary in their use of "specific restitution," with the term sometimes used explicitly to describe a remedy for an identifiable asset other than the one to which the plaintiff originally was entitled.⁵⁴ Some scholars, such as Andrew Kull and Douglas Laycock, have in their individual writings implied that "specific restitution" is a misnomer for a remedy that is the result of tracing the plaintiff's original asset into a different form.⁵⁵ This section will detail the varying ways in which American scholarship has employed the term specific restitution.

1. *The First Restatement's Distinction Between "Specific Restitution" and Tracing an Asset into Another Form*

The first *Restatement* uses the term specific restitution mainly to mean the return to the plaintiff of the plaintiff's original asset.⁵⁶ Examples include the return of land or chattel originally belonging to the plaintiff.⁵⁷ The first *Restatement* also applies "specific restitution" to the return of the plaintiff's money in circumstances such as defendant

52. See *infra* notes 56–59, 63–66 and accompanying text.

53. See *infra* notes 60–62 and accompanying text.

54. See *infra* notes 67–86 and accompanying text.

55. See *infra* notes 90–92 and accompanying text. As I will show, however, Professor Kull, in his capacity as reporter for the *Restatement (Third) of Restitution and Unjust Enrichment*, sometimes has used "specific restitution" inaccurately to describe recovery of a traced asset. See *infra* note 107 and accompanying text; see also discussion *infra* Part III.

56. See, e.g., RESTATEMENT OF RESTITUTION § 39 cmt. e (1937) ("If the transferee still retains the subject matter, he normally can avoid further liability by making specific restitution . . ."); *id.* § 74 cmts. a, e (discussing right to specific restitution of property transferred under a judgment that was subsequently reversed); *id.* § 123 (stating that bona fide transferee who is not a purchaser for value may be obliged to "return the subject matter in specie, if he has it"); *id.* § 170 cmt. a (noting impossibility of specific restitution of an improvement that cannot be severed from the land or chattels upon which the improvement was made).

57. See *id.* § 4 cmt. c (giving examples of "[s]pecific restitution in actions at law" as return of land or chattel via ejectment, replevin, and detinue); *id.* § 39 cmt. d (stating that no specific restitution is possible if chattel has been made part of land or chattel of another and cannot be profitably severed); *id.* § 121 (asserting that finder of chattel, while still in possession of the chattel, is under a duty of specific restitution to owner); *id.* § 141 (land); *id.* § 151 cmt. a (chattel); *id.* § 160 cmt. g ("[I]f one person obtains a unique chattel or land from another by fraud, and thereafter transfers the chattel or land to a third person . . . the defrauded person can maintain a proceeding in equity for specific restitution against the third person.").

insolvency or abuse of a fiduciary or confidential relation.⁵⁸ Moreover, in a comment labeled "Specific Restitution," all the illustrations involve the return of the original thing (land, chattel, or money) to which the plaintiff was entitled.⁵⁹ These uses of "specific restitution" in the first *Restatement* are consistent with the precise definition of specific relief as a remedy that gives the plaintiff the original thing to which the plaintiff was entitled.

In a few places, however, the first *Restatement* employs "specific restitution" to denote an asset-based remedy, as a contrast to a money judgment.⁶⁰ For example, the first *Restatement* mentions that in some cases, "a claimant has an election to obtain damages at law or to obtain specific restitution in equity."⁶¹ With respect to this mention of "specific restitution in equity," the first *Restatement* directs the reader to a part entitled "Constructive Trusts and Analogous Equitable Remedies."⁶²

As a strictly logical matter, a conception of specific restitution as an asset-based remedy would include a remedy that gives the plaintiff an asset, via tracing, that is not the plaintiff's original asset. However, the instances in which the first *Restatement* uses "specific restitution" broadly to mean an asset-based remedy must be read in light of the numerous times in which the first *Restatement* distinguishes specific restitution from recovery of something different than the plaintiff's original asset. For example, the first *Restatement* in black letter asserts that "[a] person is entitled to specific restitution of property from another *or to the product* of such property."⁶³ The accompanying commentary declares that "a person is required to restore property *in specie or to account for its direct*

58. See, e.g., *id.* § 160 cmt. e (referring to availability of "specific restitution" of money still held by payee if payee is insolvent); *id.* ("Even though what is transferred is money or a chattel which is not unique, the payor or transferor is entitled to maintain a proceeding in equity for specific restitution if the payment or transfer was procured by an abuse of a fiduciary or confidential relation."); *id.* § 163 cmt. d, illus. 5 (providing as illustration the availability of a constructive trust over plaintiff's money in insolvent debtor's bank account); *id.* § 166 cmt. b (discussing availability of specific restitution of "the chattels or money" that a person acquired by fraud if the person is insolvent).

59. See *id.* § 163 cmt. d.

60. See, e.g., *id.* pt. 1, introductory note; see also *id.* § 4 cmt. d (using specific restitution broadly in a section entitled "Remedies" and cross-referencing section 160 entitled "Constructive Trust"); *id.* ch. 8, introductory note, at 595-96. The first *Restatement* notes:

The right to specific restitution and the effect upon the amount of recovery of the rules relating to constructive trusts, equitable liens and subrogation are stated in §§ 160-215.

Actions for restitution have for their primary purpose taking from the defendant and restoring to the plaintiff something to which the plaintiff is entitled, or if this is not done, causing the defendant to pay the plaintiff an amount which will restore the plaintiff to the position in which he was before the defendant received the benefit.

Id.

61. *Id.* pt. 1, introductory note, at 10.

62. *Id.*

63. *Id.* § 158 (emphasis added).

or indirect product.”⁶⁴ These statements confine the concept of specific restitution to recovery of the plaintiff’s original asset; the term “product” is used to describe something other than the plaintiff’s original asset. In another section, the first *Restatement* employs “specific restitution” distinctly from the situation in which a constructive trust may be imposed over property that the wrongdoer obtained in exchange for the claimant’s original chattel.⁶⁵

Perhaps most significantly, in a chapter entitled “Following Property into Its Product,” the first *Restatement* does not use “specific restitution” nor even the word “specific.” Instead, the first *Restatement* uses language such as the claimant “is entitled to,” “may reach,” or may “enforce a constructive trust upon” the “product” of the claimant’s property or property that was acquired “in exchange.”⁶⁶ In sum, the first *Restatement* does not support using “specific restitution” to describe a remedy for an asset that is different than the plaintiff’s original asset.

2. *Individual Scholarship and Drafts of the Restatement (Second) of Restitution*

The first explicit description of “specific restitution” as including the right to a traced asset apparently was made by Professor John Dawson in 1951. In his book of lectures, *Unjust Enrichment: A Comparative Analysis*, Dawson expressly referred to “specific restitution of traceable assets”⁶⁷ and “specific restitution of [defendant’s] gains.”⁶⁸ He also described tracing an asset into a different form as resulting in the recovery of a “substitute asset.”⁶⁹ This presents the linguistic

64. *Id.* cmt. a (emphasis added).

65. *Id.* § 166 cmt. f. The first *Restatement* asserts:

If, however, the remedies at law are inadequate, as for example if the wrongdoer obtained possession of chattels of a unique character, or if the wrongdoer is insolvent, a suit in equity for specific restitution can be maintained against him. So also, if an intentional converter exchanges the chattels for property to which he acquires title, he holds the property so acquired upon a constructive trust for the person whose chattels he converted, and a suit in equity can be maintained against him to reach the property so acquired.

Id. (citation omitted).

66. See, e.g., *id.* § 202 (“Where a person wrongfully disposes of property of another . . . and acquires in exchange other property, the other is entitled at his option to enforce . . . a constructive trust of the property so acquired . . .”); *id.* § 202 cmt. e (stating that “claimant can reach the product of his property”); *id.* § 202, reporter’s notes, at 206 (referring to “[t]he equitable doctrine of following property into its product, which permits the owner of the property to enforce a constructive trust of the product”); *id.* § 204 (referring to “duty . . . to surrender property . . . acquired in exchange”); *id.* § 210 (“the claimant is entitled to enforce a constructive trust upon property which is wholly the product of his property”); see also *id.* §§ 211–213, 215.

67. Dawson, *supra* note 51, at 34.

68. *Id.* at 30. Dawson also used specific restitution in the broad, asset-based connotation evidenced in the first *Restatement*; he described the constructive trust as giving “specific rather than money restitution.” *Id.* at 32.

69. *Id.* at 27, 31. In a 1981 article, Dawson again linked specific restitution to obtaining a substitute asset. John P. Dawson, *Erasable Enrichment in German Law*, 61 B.U. L. REV. 271, 280 (1981) (describing the constructive trust “as a mechanism for laying hold of the traceable product and

awkwardness of calling recovery of a *substitute* asset a form of *specific* restitution.

Unlike Dawson, Professor Dan Dobbs in his 1973 remedies treatise did not conflate specific restitution with the recovery of an asset different than the plaintiff's original asset. In a section called "Specific and Substitutionary Restitution," Dobbs wrote:

Restitution is often *in specie*. That is, the very thing taken from the plaintiff is restored to him. This is also called specific restitution. In other cases, restitution is substitutionary. That is, the very item taken from the plaintiff is not restored, but some substitute, usually money, is given in its stead.⁷⁰

Moreover, in his discussion of tracing or "following property into its product," Dobbs did not use the term specific restitution.⁷¹ In his 1993 multi-volume remedies treatise, however, Dobbs changed his definitions of specific and substitutionary restitution. He wrote: "Restitution is specific or *in specie* when the plaintiff is restored to the very thing taken from him or to its product. Restitution is substitutionary when the plaintiff is given a *money substitute* for the thing or the entitlements taken from him."⁷² With this language, Dobbs broadened the term specific restitution beyond restoration of the plaintiff's original asset to include the product of the original asset and, at the same time, he limited substitutionary restitution to money.⁷³

Perhaps the changed definitions between the 1973 and 1993 Dobbs treatises were influenced by the arrival in 1978 of a four-volume treatise on restitution by Professor George Palmer.⁷⁴ Palmer, like the first *Restatement*, used "specific restitution" broadly, in juxtaposition to "a simple money judgment."⁷⁵ In doing so, Palmer introduced the terminology of "value restitution" as a contrast to specific restitution.⁷⁶

ordering its surrender—specific restitution of the substitute asset").

70. DOBBS, *supra* note 12, § 4.4, at 256.

71. *Id.* § 4.3, at 242–43, 247–48.

72. 1 DOBBS, *supra* note 39, § 4.4, at 625 (second and third emphases added).

73. In the 1993 multivolume treatise, Professor Dobbs also differentiated "specific" from "monetary" restitution. 3 DOBBS, *supra* note 39, § 12.7(2), at 164 (section entitled "Form of Restitution: Specific v. Monetary"). As I asserted earlier, this is a mistaken dichotomy. *See supra* Part I.B.2. However, in his earlier 1973 treatise, Dobbs indicated that money can be considered specific restitution when money was the thing taken from the plaintiff. DOBBS, *supra* note 12, § 4.4, at 259 ("Recovery of money where money was the thing taken from the plaintiff is in a limited sense an *in specie* recovery.").

74. PALMER, *supra* note 51.

75. *See, e.g.*, 1 PALMER, *supra* note 51, § 1.3, at 13 ("Quasi contract leads to a simple money judgment, whereas the normal constructive trust decree is one for specific restitution."); *id.* § 4.7, at 430 (noting that "specific restitution in equity has not been limited to situations in which the remedies at law are found to be inadequate").

76. *See, e.g., id.* § 1.6, at 38–39 (contrasting "value restitution" at law with "specific restitution"); *id.* § 4.7, at 428–29 (same); *id.* § 4.19, at 193–94 (subsection entitled "value restitution" within discussion of remedies for vendor of land).

Palmer, like Dawson before him, also employed the term specific restitution to encompass tracing into something other than the original asset.⁷⁷ For example, Palmer wrote: "Specific restitution in equity takes two principal forms. In one the plaintiff obtains specific restitution of the very property he transferred to the defendant, in the other of some traceable product of the money or other property so transferred."⁷⁸ In a separate section discussing the tracing rules of the first *Restatement*, Palmer used "specific restitution" despite the first *Restatement's* avoidance of that term in connection with tracing an asset into a different form.⁷⁹ Also, like Dawson, Palmer awkwardly wrote of specific restitution of a "substituted" asset.⁸⁰

The American Law Institute produced two tentative drafts of a *Restatement (Second) of Restitution*, in 1983 and 1984, but the project ultimately was abandoned.⁸¹ Like the first *Restatement*, the tentative drafts of the *Restatement (Second)* use "specific restitution" in the broad sense of an asset-based remedy, juxtaposing it to a simple money judgment.⁸² For example, Tentative Draft No. 1 "divides judicial remedies into two types: money judgments effecting restitution, and orders of specific restitution."⁸³ But the *Restatement (Second)* drafts expand the term beyond its use in the first *Restatement*. Like Dawson and Palmer, the drafts of the *Restatement (Second)* explicitly use "specific restitution" to describe a remedy that gives the plaintiff an asset, through tracing, that is different than the plaintiff's original asset.⁸⁴ Tentative

77. See, e.g., *id.* § 2.14 (in section entitled "Tracing in Equity," attaching label "specific restitution" to recovery of the traced asset); *id.* § 2.16 (discussing commingled funds and circumstances in which claimant should be able to get "specific restitution" of the traceable product of a withdrawal).

78. PALMER, *supra* note 51, § 11.5(b), at 516.

79. 1 PALMER, *supra* note 51, § 2.17, at 211-12.

80. *Id.* § 2.14, at 175-76. Palmer declared:

Through tracing, a person who in the first instance would be entitled to the restitution of money or other property is often permitted to assert his claim against a substituted asset—an asset which is traceable to or the product of such money or other property. The end result of tracing may be a decree for specific restitution of the traced asset, or a decree imposing a lien on the asset to secure a money claim, or a decree for subrogation"

Id. (footnotes omitted).

81. See *supra* note 9.

82. See, e.g., RESTATEMENT (SECOND) OF RESTITUTION § 10(1) (Tentative Draft No. 1, 1983) (stating that "a person unjustly enriched by holding an interest in an asset must make specific restitution"); *id.* § 12 ("The interest of justice may cause a court, in its discretion, to withhold an order of specific restitution, or to order specific restitution only on condition that the defendant fail to make restitution in money . . ."). Moreover, Tentative Draft No. 1 has distinct sections entitled "Orders for Specific Restitution," and "Money Judgments to Effect Restitution." *Id.* §§ 10, 13.

83. *Id.* ch. 2, introductory note.

84. See, e.g., *id.* § 8 cmt. c ("The [constructive trust] is available to give specific restitution against a person, who, having acquired property from the claimant by fraud, exchanges it for other property . . ."); *id.* cmt. d ("[I]f claimant seeks specific restitution of proceeds of a resale by the buyer, or of products of the property sold, the remedy claimed is habitually described as the imposition of a constructive trust."); *id.* § 10 cmt. a, illus. 1-4 (in section labeled "Orders for Specific Restitution,"

Draft No. 2, the heart of which addresses constructive trusts and tracing assets, uses both "specific restitution"⁸⁵ and more accurate language such as the "right to restitution from property" or "from a fund."⁸⁶

A subtle linguistic distinction is important at this point. The drafts of the *Restatement (Second)*, as well as some modern scholars, refer at times to the right to restitution of a "specific" asset, property, or fund.⁸⁷ Here, the adjective "specific" means "particular." The usage is thus parallel to terminology in the law, discussed in Part I, that employs "specific" in the context of assets to distinguish a particular asset from "general" or all assets.⁸⁸

The phrase "restitution of a specific asset" makes clear that a particular asset, rather than any asset, is the object. Thus, perhaps it follows that "specific restitution" can be read to mean restitution of a particular asset. I suggest, however, that it is confusing and misleading to make the linguistic leap to using the term specific restitution to describe a remedy for something other than the plaintiff's original asset. Although "specific" at times means "particular" in the law, "specific restitution" denotes a remedy. As discussed in Part I, "specific" in the context of remedies should be understood as an antonym of "substitutionary." It is therefore oxymoronic to use "specific restitution" to describe recovery of an asset that is different from the plaintiff's original asset. The linguistic

providing illustrations of tracing plaintiff's original asset into a different form).

85. See, e.g., RESTATEMENT (SECOND) OF RESTITUTION § 30 cmt. a (Tentative Draft No. 2, 1984).

86. See, e.g., *id.* foreword, at vii-viii ("Readers should be attentive . . . to one novelty of diction: the distinction between a right to restitution *simpliciter* and a 'right to restitution from property' or 'from a fund.'"); *id.* reporter's note, at xiii (writing of "the general conception, 'rights to restitution from property,'" (citation omitted)); *id.* ch. 3, introductory note; *id.* § 32 (titled in part, "Right to Restitution from Property").

87. See, e.g., RESTATEMENT (SECOND) OF RESTITUTION ch. 2, introductory note (Tentative Draft No. 1, 1983) ("When it is determined that a person is unjustly enriched by holding an interest in a specific asset . . . one to whom he owes restitution of that interest may require him to account for it as owner."); RESTATEMENT (SECOND) OF RESTITUTION ch. 3, introductory note (Tentative Draft No. 2, 1984) (referring to "rights to restitution from specific property" and explaining that the right to restitution can result, depending on the circumstances, in "a judgment for money against the person owing restitution" or in a remedy to a "specific asset"); Dale A. Oesterle, *Deficiencies of the Restitutionary Right to Trace Misappropriated Property in Equity and in UCC § 9-306*, 68 CORNELL L. REV. 172, 172 (1983) ("Tracing relief can augment normal measures of recovery significantly whenever a claimant can identify specific property held by a defendant as derivative of property against which the claimant had or has had an *in specie* claim."); *id.* at 173 ("[An o]wner can 'trace' into the stock and demand it *in specie*."); Dale A. Oesterle, *Restitution and Reform*, 79 MICH. L. REV. 336, 357-58 & n.92 (1980) (stating that "[t]he end result of tracing can be a decree for specific restitution of the traced asset"); Emily L. Sherwin, *Constructive Trusts in Bankruptcy*, 1989 U. ILL. L. REV. 297, 297 (1989) ("A constructive trust allows the injured party to claim restitution of specific property traceable to her claim, either in its original form or as the product of exchange."); *id.* (linking the "right to specific restitution" to property that is the product of exchange).

88. See *supra* notes 16-22 and accompanying text.

difficulty is compounded when “specific restitution” is used to include obtaining a “substitute” asset.⁸⁹

Professor Andrew Kull, before his work as reporter of the *Restatement (Third)*, asserted that “specific restitution” is a misnomer for a remedy giving the plaintiff something other than the plaintiff’s original asset. In his influential article, *Rationalizing Restitution*, Kull posed a hypothetical of a defendant who embezzled \$10 and bought property worth \$100.⁹⁰ The plaintiff’s remedy in restitution to the property, said Kull, was “hardly specific restitution; on the contrary, the plaintiff recovers property worth ten times what he lost.”⁹¹ Professor Douglas Laycock, an advisor to the *Restatement (Third)*, made a similar point in his earlier article, *The Scope and Significance of Restitution*: “Even some cases of tracing are hard to explain as specific restitution. Consider a defendant who misappropriates property and uses it to make large profits that plaintiff would not have made But we are not restoring anything that plaintiff once had or ever would have had.”⁹² As will be demonstrated in Part III, however, current drafts of the *Restatement (Third)* do not reflect this recognition that “specific restitution” is a misnomer for recovery of an asset different from the plaintiff’s original asset.

Having discussed scholarly uses of “specific restitution,” it is now time to examine court uses of the term. As I will discuss in the next section, courts rarely use the term and when they do, the context overwhelmingly is that of recovery of the original asset to which the plaintiff was entitled.

89. See, e.g., RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 58 cmt. a (Tentative Draft No. 6, 2008) (connecting “specific restitution” to the concept that “[i]f A has a right to restitution of X in the hands of B, and B obtains Y in exchange for X, A has the same rights in the substitute as in the original”); Dawson, *supra* note 69 (characterizing the constructive trust “as a mechanism for laying hold of the traceable product and ordering its surrender—specific restitution of the substitute asset.”); see also *supra* notes 69, 80 and accompanying text; *infra* notes 113–14 and accompanying text.

90. Andrew Kull, *supra* note 33, at 1226.

91. *Id.*; see also *id.* at 1218. Kull asserts:

The plaintiff who discovers among the defendant’s assets the very thing that was “his” (a stolen watch, or currency kept in a mattress) has no need of tracing to assert a prior claim. The plaintiff who, with the aid of tracing, can identify proceeds, or proceeds of proceeds, obtains the same priority, despite the fact that “his” watch or currency have long since come into other hands. The first of the two claimants obtains what is incidentally specific restitution, but the second obtains what is effectively the same remedy: restitution premised on the unjust enrichment of rival creditors. What the two situations have in common is the palpable augmentation of the debtor’s assets, not the restoration of specific property.

Id.

92. Laycock, *supra* note 8, at 1280–81 (footnote omitted). Laycock continued: “We often explain such awards as restoration of the proceeds of plaintiff’s property.” *Id.* at 1281.

B. CASE LAW

While “specific restitution” appears in restitution scholarship with some frequency, the term has not been popular in reported cases. Only once—in 1795—has the term specific restitution appeared in any Supreme Court opinion.⁹³ In a case involving the capture of a ship and its cargo, Justice Iredell, dissenting, used the term to mean return of property originally belonging to a plaintiff.⁹⁴

A computerized search that I constructed to find the term specific restitution in reported civil cases in the lower federal and state courts revealed only 134 cases using the term since 1793.⁹⁵ Of those 134 cases during the 215-year period, only one state court case used “specific restitution” to mean the plaintiff’s remedy to a traced asset different than the asset to which the plaintiff originally was entitled.⁹⁶ Some cases quote, without elaboration, an ambiguous statement by Professor Dobbs that constructive trusts are to be used wherever specific restitution in equity is appropriate, but all these cases involved situations in which claimants were seeking the original thing wrongfully obtained by the defendant.⁹⁷ Other cases make explicit that “specific restitution” is the restoration of the original thing taken from the plaintiff.⁹⁸

93. *Penhallow v. Doane's Administrators*, 3 U.S. (1 Dall.) 54, 98, 113 (1795) (Iredell, J., dissenting). The term “specific performance” first appeared in a Supreme Court opinion four years later. *New York v. Connecticut*, 4 U.S. (4 Dall.) 1, 3 (1799).

94. *Penhallow*, 3 U.S. (1 Dall.) at 98. Justice Iredell used the terms “specific restitution” and “specific execution” interchangeably, and in contrast to damages. *Id.* at 97–98.

95. In an attempt to exclude criminal cases, I used the following search in LEXIS for federal and state court cases: “specific restitution and not (crim! or sentenc!).” (search performed on June 2, 2008).

96. *Unicare, Inc. v. Thurman*, 599 P.2d 925, 928 (Colo. Ct. App. 1979) (employing term “specific restitution” to describe plaintiff’s right to impose constructive trust on real property purchased with corporation funds in breach of defendant corporate officer’s fiduciary duties).

97. *Chisholm v. W. Reserves Oil Co.*, 655 F.2d 94, 96 (6th Cir. 1981) (seeking recovery of royalties—the original thing to which plaintiff was entitled (citing *Dobbs*, *supra* note 12, at 246)); *Gluth Bros. Constr., Inc. v. Union Nat’l Bank*, 518 N.E.2d 1345, 1351 (Ill. App. Ct. 1988) (involving claim for original thing—money—wrongfully taken by defendant, and stating that “what we focus on is the court’s requirement that there is a wrongful acquisition of property and that it would be unjust to allow the acquiring party to retain it” (citing *Charles Hester Enter., Inc. v. Ill. Founders Ins. Co.*, 499 N.E.2d 1319 (Ill. 1986)); *Dobbs*, *supra* note 12, at 246–47)); *Flanigan v. Munson*, 818 A.2d 1275, 1281 (N.J. 2003) (involving claim for original asset—insurance proceeds—wrongfully taken by defendant (citing *Dobbs*, *supra* note 12, at 246)).

98. For example, a federal district court in 1863 used the term “specific restitution” in connection with obtaining cargo in admiralty, and it contrasted specific restitution to obtaining “the proceeds” of cargo that had been converted into money. *The Victory*, 28 F. Cas. 1183, 1184–85 (D. Mass. 1863) (No. 16,938); *see also* *Leisure Resort Tech. v. Trading Cove Assoc.*, No. X06CV000164799S, 2004 Conn. Super. LEXIS 2112, at *18 n.5 (Conn. Super. Ct. Aug. 4, 2004) (noting that the plaintiff did not seek specific restitution of its original interest, but rather damages, and stating that “[s]pecific restitution involves the restoration to the plaintiff of the very thing that is taken. Substitutionary restitution requests some substitute, usually money, for the property that is taken.” (citing *Dobbs*, *supra* note 12, at 256)); *cf.* *Demoulas v. Demoulas*, No. 90-2344, 1996 Mass. Super. LEXIS 735, at *15 (Mass. Super. Ct. Aug. 20, 1996) (referring to “specific restitution” of shares of stock that were fungible with the shares to which the plaintiff originally was entitled).

In sum, there has been a dearth of reported case law using the term specific restitution. With but one exception in the searched cases, when the term has been used by state and federal courts, either the immediately surrounding language in the opinion or the context of the case indicates that the term means restoration of the asset to which the plaintiff originally was entitled. The infrequent and precise usage of "specific restitution" in the cases should inform the terminology chosen by the *Restatement (Third)*.

C. TERMINOLOGY IN COMMON LAW COUNTRIES

The common law countries of England, Australia, and Canada serve as helpful points of comparison with respect to restitution terminology. These countries were heavily influenced by the first *Restatement's* conception of the modern law of restitution and unjust enrichment.⁹⁹ Generally, restitution treatises and casebooks in these countries divide restitutionary remedies between those that are "personal" or "*in personam*" and those that are "proprietary" or "*in rem*."¹⁰⁰ For example, Goff and Jones, in their treatise on restitution in England, juxtapose the "personal obligation to make restitution to the plaintiff" with a "proprietary remedy, ground[ed] on . . . title to land, chattels, or money."¹⁰¹ The distinction between personal and proprietary restitutionary remedies thus mirrors the distinction between restitution of the value of the defendant's unjust enrichment and restitution of an identifiable asset. Mason and Carter, authors of the leading Australian restitution treatise, similarly differentiate between "personal" and "proprietary" claims.¹⁰² In Canada, a leading treatise on restitution by Maddaugh and McCamus distinguishes between "an *in personam*

99. See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT reporter's introductory memorandum, at xv (Discussion Draft 2000) (acknowledging the development of restitution law in England, Canada, and Australia as "particularly noteworthy").

100. See, e.g., PETER BIRKS, AN INTRODUCTION TO THE LAW OF RESTITUTION 377-78 (1985) (referring to "a right *in rem*," as opposed to "a right *in personam*," and also to "a restitutionary proprietary right"); ANDREW BURROWS, THE LAW OF RESTITUTION 28 (1993). Burrows asserts:

Remedies reversing unjust enrichment may be personal or proprietary. Personal restitutionary remedies respond to value having been received by the defendant irrespective of whether he still retains particular property. They are not concerned with the restoration of particular property and do not afford priority on the defendant's insolvency. In contrast, proprietary restitutionary remedies afford priority on the defendant's insolvency and are dependent on the defendant's retention of particular property.

Id. (footnote omitted); G.H.L. FRIDMAN, RESTITUTION 395-98 (2d ed. 1992) (containing section on remedies that differentiates "personal" and "proprietary" remedies); LIONEL D. SMITH ET AL., THE LAW OF RESTITUTION IN CANADA: CASES, NOTES, AND MATERIALS 33 (2004) (Chapter 7 is titled "Personal or Proprietary Restitution").

101. LORD GOFF & GARETH JONES, THE LAW OF RESTITUTION 79 (2002) (citation omitted).

102. KEITH MASON & J.W. CARTER, RESTITUTION LAW IN AUSTRALIA 90-98 (1995).

judgment for the value of benefits received by the defendant” and “proprietary” or “*in rem*” remedies.¹⁰³

Scholars in these common law countries rarely use “specific restitution,” but when the term is used, it is given the precise meaning of recovery of the original thing to which the plaintiff was entitled.¹⁰⁴ A draft of early sections of the *Restatement (Third)* employed the term “proprietary” to describe asset-based remedies—patterned after the terminology used by Goff and Jones.¹⁰⁵ Drafts of subsequent sections of the *Restatement (Third)* have shied away from the term “proprietary” and instead used terms such as “asset-based restitution,” “property-based remedies,” and “restitution from property.”¹⁰⁶ Further departing from the example of the English, Australian, and Canadian scholars, the *Restatement (Third)* sometimes uses “specific restitution” to describe any asset-based remedy, including a remedy that would give the plaintiff an asset different than the plaintiff’s original asset.¹⁰⁷ In the next Part, I will elaborate on the terminology of the *Restatement (Third)* and offer some suggested revisions.

III. THE RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT

Current drafts of the *Restatement (Third) of Restitution and Unjust Enrichment* vacillate between using a helpful taxonomy for different categories of remedies in restitution and using the problematic term “specific restitution.” The Discussion Draft—the initial draft in the project—has an introductory general principles section that divides remedies in restitution into three categories: reformation of instruments,

103. See, e.g., PETER D. MADDAUGH & JOHN D. MCCAMUS, *THE LAW OF RESTITUTION* 94 (2d ed. 2004).

104. See, e.g., GOFF & JONES, *supra* note 101, at 653–55 (writing of specific restitution of goods); MASON & CARTER, *supra* note 102, at 634 (titled “Specific Restitution,” and noting that “[f]rom early times, courts of equity have exercised a jurisdiction to order the delivery up of heirlooms and other chattels where damages . . . would be inadequate”). Some scholars in these common law countries do occasionally write of recovery of a “specific asset” or “specific property.” See, e.g., BURROWS, *supra* note 100, at 40. Burrows comments:

[P]roprietary remedies (eg recaption [of one's goods], the recovery of land, and the equitable tracing remedies) triggered by legal or equitable ownership (ie retention of the plaintiff's property) are easily justified in that the plaintiff is merely seeking to recover specific property in the defendant's hands that belongs to him (the plaintiff) at law or in equity.

Id.; MADDAUGH & MCCAMUS, *supra* note 103 (referring to the principle that “as the plaintiff becomes entitled to a specific asset, accretion in the value of the property will thus enure to the benefit of the claimant”). The context of these uses make evident that “specific” means “particular.” See sources cited *supra* notes 13–17 and accompanying text.

105. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 4, reporter's note (Discussion Draft 2000) (referring to “proprietary rights in some specific property or fund” and asserting that “[t]he term ‘proprietary remedy’ is adopted tentatively and with some hesitation. It is inspired by the Goff & Jones analysis of ‘personal and proprietary claims.’”).

106. See sources cited *infra* notes 108–11 and accompanying text.

107. See sources cited *infra* notes 112–15 and accompanying text.

“a judgment for money . . . calculated to eliminate unjust enrichment,” and “rights in identifiable property or an identifiable fund.”¹⁰⁸ This taxonomy makes clear that a remedy in restitution might be for money measured by the value of the unjust enrichment or it might be for an asset—a fund of money or property—that is identified as rightfully belonging to the plaintiff. Drafts of the *Restatement (Third)* use “restitution of value”¹⁰⁹ and “asset-based restitution”¹¹⁰ to make a similar distinction. The drafts also employ “property-based remedies” and “restitution from property” to denote restitution of an asset rightfully belonging to the plaintiff.¹¹¹ These various terms used by the *Restatement (Third)* drafts accurately and clearly describe the concepts at issue.

Rather than adhere consistently to these helpful terms, however, the drafts often lapse into unnecessary or misleading uses of “specific restitution.” At times, the *Restatement (Third)*, like prior scholarship, uses “specific restitution” broadly to mean an asset-based remedy rather than a money judgment.¹¹² This is an unnecessary and potentially

108. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 4 (Discussion Draft 2000).

109. See, e.g., RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 55 cmt. c (Tentative Draft No. 6, 2008) (“Constructive trust becomes useful when the claimant prefers restitution of identifiable property or its product to restitution of value.”); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 53(1) (Tentative Draft No. 5, 2007) (writing of “restitution of property or its value”); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT ch. 5, introductory note (Tentative Draft No. 4, 2005) (“Innocent interference with another’s interests is rectified by compensation for harm, or by restitution of what has been taken, its product, or its value.”); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 17 cmt. a (Tentative Draft No. 2, 2002) (“This section describes a claim by the legal or equitable owner of property, by which the claimant seeks restitution of the property transferred, its value, or the proceeds thereof.”).

110. See, e.g., RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 55 cmt. h (Tentative Draft No. 6, 2008) (“The practical advantages of asset-based restitution are particularly apparent when the claimant obtains restoration of appreciated property without the need to prove its value.”); *id.* § 58 cmt. d(1) (commenting on “[a]sset-based remedies in restitution”); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT ch. 7, introductory note (Tentative Draft No. 5, 2007) (referring to “different modes of asset-based restitution”).

111. See, e.g., RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT ch. 7, introductory note (Tentative Draft No. 6, 2008) (mentioning that “forms of relief from specific property are variously referred to in this Restatement—depending on the context—as the ‘asset-based’ or ‘property-based’ remedies in restitution, as ‘specific relief,’ or as ‘restitution from property’”). In the early Discussion Draft of the *Restatement (Third)*, the term “proprietary remedies” was used in the “General Principles” portion of the draft. See *supra* note 105 and accompanying text.

112. See, e.g., RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 55 cmt. c (Tentative Draft No. 6, 2008) (“Constructive trust in a two-party contest is a flexible means of achieving specific restitution . . . Constructive trust becomes useful when the claimant prefers restitution of identifiable property or its product to restitution of value.” (emphasis added)); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 4, reporter’s note, at 28 (Discussion Draft 2000) (referring to “tripartite division” of restitution remedies into “reformation—specific restitution—money”). But see *id.* at 29 (seemingly acknowledging that “specific restitution” should not mean any asset-based remedy in stating that the “category of proprietary remedies is broader than specific restitution, because it includes a case in which—for example—the claimant has traced misappropriated property into its product, held by the defendant, and the remedy is a declaration that the defendant holds the new property in constructive trust”).

confusing usage of “specific restitution,” given that the drafts elsewhere employ more accurate terms, such as “asset-based restitution” or “restitution from identifiable property.” More troubling, current drafts of the *Restatement (Third)* frequently use “specific restitution” explicitly to describe a remedy that gives the plaintiff an asset other than its original asset.¹¹³ At times, the drafts awkwardly indicate that *specific* restitution encompasses the recovery of a *substitute* asset.¹¹⁴ Further, as but one example of the confusion wrought by using the term specific restitution, the *Restatement (Third)* drafts at various points assert that the equitable lien both is and is not a form of specific restitution.¹¹⁵

The *Restatement (Third) of Restitution and Unjust Enrichment* has the opportunity to make the language of restitution more accurate and understandable. To that end, I offer a few suggestions. First, when it is important to distinguish asset-based restitution from restitution of value, I suggest that the *Restatement (Third)* uniformly employ the term “asset-based restitution.” This term is at the right level of generality, for it encompasses both restitution of a fund of money and restitution of property. Second, the *Restatement (Third)* should dispense with the term “specific restitution” altogether. The term is unnecessary to understand

113. See, e.g., RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 58 cmt. a (Tentative Draft No. 6, 2008) (connecting “specific restitution” to the concept that “[i]f A has a right to restitution of X in the hands of B, and B obtains Y in exchange for X, A has the same rights in the substitute as in the original”); *id.* § 54 cmt. f, illus. 16 (“If specific restitution is unavailable because neither the shares, nor their fungible equivalent, *nor their product* can be identified in A’s hands” (emphasis added)). But see RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 4, reporter’s note (Discussion Draft, 2000) (“[The] category of proprietary remedies is broader than specific restitution, because it includes a case in which—for example—the claimant has traced misappropriated property into its product, held by the defendant, and the remedy is a declaration that the defendant holds the new property in constructive trust.”).

114. See, e.g., RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 48 cmt. d(4) (Tentative Draft No. 5, 2007) (“[W]hen the disputed assets have evidently been acquired as a substitute or replacement for those to which the claimant was contractually entitled . . . specific relief in restitution vindicates a property right that is good against any subsequent taker who does not qualify as a bona fide purchaser.”); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 41 cmt. c (Tentative Draft No. 4, 2005) (“Specific relief in restitution permits a claimant to follow property into its product and to claim an ownership or security interest in the substitute.”). As discussed in Part II, Professors Dawson and Palmer also wrote awkwardly of “specific restitution” of a “substitute” asset. See *supra* notes 69, 80 and accompanying text.

115. Compare RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 10, reporter’s note (Tentative Draft No. 1, 2001) (contrasting specific restitution with equitable lien), and *id.* § 13, reporter’s note i(2) (same), with RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 40 cmt. e, illus. 20 (Tentative Draft No. 4, 2005) (“Specific relief in this case takes the form of an equitable lien”), and *id.* § 41 cmt. e, illus. 13 (“Owner’s rights by way of specific restitution will be limited to an equitable lien on the stock”). The Supreme Court has indicated that the equitable lien is not specific relief. In *Department of the Army v. Blue Fox, Inc.*, the Court stated “equitable liens by their nature constitute substitute or compensatory relief rather than specific relief” because they do not “give the plaintiff the very thing to which he was entitled,” but rather a “security interest in the property, which [the plaintiff] can then use to satisfy a money claim.” 525 U.S. 255, 262–63 (1999) (citations omitted).

the important concept that some restitutionary remedies afford the plaintiff the right to an asset, as opposed to the value of the defendant's unjust enrichment. Third, terminology such as restitution of "specific property" or of a "specific asset" should be avoided. Although these phrases, carefully understood, mean a "particular" property or asset,¹¹⁶ their use may lead to confused and inaccurate invocation of the term "specific restitution." It would be better either to use the adjective "particular" or to use no adjective at all when referring to the plaintiff's right to restitution of an asset.

Fourth, if the *Restatement (Third)* is to use "specific restitution," then a definitional choice must be made and consistently applied. Following the example of American courts and of other countries in their limited invocation of "specific restitution," the *Restatement (Third)* should only employ the precise meaning of the term—restitution of the plaintiff's original asset. This would be consistent with the most precise usage of "specific relief"—as a remedy giving the plaintiff the original thing to which the plaintiff was entitled.

It is questionable, however, why "specific restitution" is even necessary to describe a remedy for the plaintiff's original asset. The important functional distinction among restitutionary remedies is between giving the monetary value of the defendant's unjust enrichment or giving the plaintiff an asset that constitutes the defendant's unjust enrichment. This functional distinction does not turn on whether the asset was the plaintiff's original asset or a different asset identified through tracing.

Fifth, the *Restatement (Third)* should make greater use of the term "restitution of value." Employing "restitution of value" and "asset-based restitution" as contrasting terms makes clear the distinction between a plaintiff receiving the value of the benefit unjustly obtained by the defendant versus a plaintiff receiving an asset held by the defendant. When money is the relief at stake, these terms are particularly helpful, for they are more accurately descriptive than "money judgment" and "specific restitution." Using "restitution of value" versus "asset-based restitution" captures the difference between money that represents the value of the defendant's unjust enrichment and money, as an identifiable fund, that is the object of an asset-based remedy.

CONCLUSION

What is specific about "specific restitution"? The fundamental problem is that the term has carried so many different, and inconsistent, meanings. I have argued here that a restitutionary remedy is "specific" only if it gives the plaintiff the very thing to which the plaintiff originally

116. See sources cited *supra* notes 87–88 and accompanying text.

was entitled. But my larger point is that using the term “specific restitution” hinders understanding of an important advantage of restitution—that sometimes, a plaintiff will be entitled to an asset held by the defendant. That asset could be the plaintiff’s original asset, or it could be a completely different asset. The term “specific restitution” adds nothing but confusion to this concept.